**SINDOMA REALTY SDN. BHD.**

**v.**

**OVERSEAS-CHINESE BANKING CORP.**

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[ORIGINATING SUMMONS NO. 31-1158 OF 1986]
5 OCTOBER 1988

***LAND LAW:*** *Foreclosure proceedings - Order of sale obtained ex parte - Cannot be set aside - Not made in default - Fraud alleged - Chargee had no knowledge - Order of stay not allowed - No jurisdiction to grant injunction.*

The chargor made an application to set aside the order of sale which was obtained in three foreclosure proceedings. The chargor was not represented at the hearing although their Counsel had been served with the originating summonses. The issue was whether the order of sale could be set aside.

In another suit, the chargor made an application for a stay of the order of sale and for an injunction to restrain the sale of the lands on the ground that a fraud had been perpetrated by their directors who had executed the charges. The chargee had no knowledge of the alleged fraud.

**Held:**

**[1]** The order of sale in the foreclosure proceedings which was made pursuant to O. 83 was not a default order. Therefore, it could not be set aside. The only remedy for the chargor was to make an appeal.

**[2]** The application for stay of the order of sale was dismissed as the chargor did not have good grounds.

**[3]** The Court did not have any jurisdiction to grant an injunction to restrain the sale of the lands as it was made by a Court of co-ordinate jurisdiction.

**Cases referred to:**

*United Malayan Banking Corpn. Bhd. v. Syarikat Perumahan Luas Sdn. Bhd. [1988] 2 CLJ (Rep) 522*
*Hock Hua Bank Bhd. v. Sahari bin Murid [1981] 1 MLJ 143*
*United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd. [1968] 2 MLJ 85*
*Lai Soon Cheong v. Kien Loong Housing Development Sdn. Bhd. & Anor. [1986] 2 MLJ 369*
*Tan Suan Choo v. Majlis Perbandaran Pulau Pinang [1983] 1 MLJ 323*
*Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor. [1975] AC 581*
*Ram Sadhan Biswas v. Mathura Mohan Hazra [1924] IC 81 3*
*Bina Satu Sdn. Bhd. v. Tan Construction [1988] 1 CLJ (Rep) 384*
*American Cyanamid Co. v. Ethicon Ltd. [1975] 2 WZR 316*

**Legislation referred to:**

National Land Code 1965, ss. 256, 257, 340
Rules of the High Court 1980, O. 19 r. 9, O. 28, O. 32 r. 1(6), O. 83

**Other source referred to:**

*White Book (1982) p. 3345, para. 3346*

*For the applicant - Thara Singh Sidhu; M/s. Thara Singh Sidhu*
*For the respondent - D.P. Naban; M/s. Skrine & Co.*

**JUDGMENT**

**Abu Mansor Ali J:**

I heard arguments in open Court in OS 1158/1986, 1159/86, 1160/86 and CS 1098/87 on 16 July 1988 at the end of which I reserved judgments. My judgment is as follows.

In each of the OS No. 1158 - 1160, the applicants are chargors and the respondents are the chargees of the pieces of land, the subject matter of the application. In each suit the applicant applied by way of summons-in-chambers in encl. 30, encl. 29, and encl. 27 respectively that the Court set aside and/or stay the order for sale granted by the Court to the respondents chargees on 2 September 1987 (the said order) encl. (34). In CS 1098/87 encl. 28 the applicant therein apply that the Court grants an interlocutory injunction against the chargees restraining the chargees from proceeding with the said order pending the disposal of the suit 1098/87 filed to ask for certain declarations.

It was agreed by the parties that as the issues in OS 1158 of 1986 to OS 1160 of 1986 are similar, the Court only hear OS 1158 of 1986 and the respondents consent that the decision in OS 1158 of 1986 will bind parties in OS 1159/86 and 1160/86. As the law applicable in CS 1098/87 is different parties agreed that applicant will submit after the submission in OS 1158/1986. Reference to the applicant and respondent in OS 1158/1986 will equally apply to OS 1159/86 and 1160/86.

The facts of the case that led to the present applications are as follows. In the said order the Oversea-Chinese Banking Corp. Ltd. are the chargees. Sindoma Realty Sdn. Bhd. are the chargors.

On 2 May 1984 in order to secure repayment of RM700,000 the chargor executed the first charge. Then the chargor executed a second charge on 10 April 1985 to secure repayment of a further sum of RM200,000. As there was default by the chargor, the chargee demanded payment on 2 August 1986. The payment not forthcoming the chargees applied for sale and on 2 September 1987 the lands were ordered to be sold by public auction. It is this order for sale that the present applicant-chargor is applying to set aside or stayed. From hereon I refer to the OCBC as "chargee" and Sindoma Realty Sdn. Bhd. as "chargor".

The first issue which the Court raised with applicant's Counsel and which the respondent's Counsel took up in reply is the powers of the Court to make the order sought for. This was the hurdle that the applicant must pass before he can even begin to argue on the merits of the application.

Applicant's Counsel commenced by saying his application is under O. 19 r. 9 and he then shifted from there and said he was proceeding under O. 32 r. 1(6) of the Rules of the High Court 1980.

Counsel said the application for sale of the property was served on chargor whose managing director was Tai Boon Kuai. Tai had engaged Counsel Messrs Looi who asked for postponements. After a few adjournments, the chargees then obtained an order for sale on 2 September 1987 in all the three originating summons which sales were to take effect on 6 December 1987. Thereafter Tai and another director, 3rd defendant in CS 1098/87 absconded.

When the shareholders of chargor became aware of the said order for sale they gave instructions to Counsel to make application to stop sale and or stay. Counsel contended the position of the matter is somewhat like a judgment in default since the chargor, though served did not argue. The position being such the Counsel further contended the Court is entitled to set aside the order for sale. Counsel cited *United Malayan Banking Corp. Bhd. v. Syarikat Perumahan Luas Sdn. Bhd.* [1988] 2 CLJ (Rep) 522 where my brother Edgar Joseph Junior J after hearing argument on the point, held that an order made on an originating summons, even though duly served on a defendant, who fails to enter an appearance and is absent at the hearing is, nevertheless, and *ex parte* order which can set aside by means of another summons-in-chambers application and need not be proceeded on by way of an appeal. The chargor also urged the Court to grant a stay as was done in *Hock Hua Bank Bhd. v. Sahari Bin Murid* [1981] 1 MLJ 143 where the order for sale was set aside.

For the chargees, however Counsel contended that applicant chargor had not crossed the first hurdle. Counsel says the relevant order that applicant chargor proceeded on was O. 28 Rules of the High Court 1980 relating to the hearing of an originating summons and not O. 32 thereof which relates to summons-in-chambers. He submitted that the order for sale was under O. 83 Rules of the High Court 1980, and it was not an in default order. Chargees applied for sale of charged property. No suggestions of any irregularity committed by the chargees. The chargees urged on the Court to dismiss the chargor's application in 1158/86-1160/86.

Though the applicant's Counsel was unable to say under what order he was applying, the chargees' Counsel quite rightly conceded and the Court held that the applicant is proceeding under O. 28 Rules of the High Court. It is quite clear on a reading of that order that I have the power to vary or set aside the order for sale if the order of 2 September 1987 was an *ex parte* order where the situation, he said was similar to the position on the *United Overseas Bank Ltd. v. Chung Khiaw Bank Ltd.* [1968] 2 MLJ 85 where Chua J said,

> It is clear then that a Judge may proceed *ex parte* to hear an application where a party duly served fails to appear at the time appointed for the hearing ... It is the hearing which is *ex parte* and an order made on such a hearing is an *ex parte*.

Mr. Naban, Counsel for the chargees however said that the position of the applicant is instead governed by *Hock Hua Bank Bhd. v. Sahari Bin Murid* [1981] 1 MLJ 143 as it is quite clear from the order of 2 September 1987 that chargors was served and represented by Counsel as in encl. (34). The order having been perfected, the applicant can only now proceed by way of an appeal. I agree with the chargees' Counsel's submission and I hold myself bound by the authority of *Hock Hua Bank Bhd. v. Sahari b. Murid* (*supra*) that the applicant should have proceeded by way of an appeal. The application to set aside and or stay of the order of 2 September 1987 could therefore be dismissed at that stage of the applicants' Counsel's submission.

In case I am in error in my judgment, I then proceed to hear the submission of the applicant in substance. It would appear the only ground advanced by the applicant in wanting the said order set aside was that the chargor's directors proceeded to instruct Counsel Messrs. L. Looi without having obtained authority of chargor to do so.

At the end of his submission for a stay applicant's Counsel said he would be happy if the applicant could have an order for a stay. I formed the impression that the applicant was more relying on his application for a stay. They want a stay as they have filed CS 1098/87 praying for all the charges be declared null and void. The trial is still to come and he urged on the Court to allow them an opportunity to prove the allegations.

The allegations are as set out in the amended statement of claim in CS 1098/87 encl. (9). Applicant Sindoma is the plaintiff. The defendants are the Oversea-Chinese Banking Corporation and the directors were made up of father and son who have absconded. Applicant's Counsel says that their claim must have some merits else the defendants would not have filed their defence and the defendant could have moved to have to the civil suit struck out but did not do so.

The substance of the plaintiff's allegation in the amended statement of claim was as follows. Plaintiff deals mainly in palm oil and has no authority to deal in rubber. Rubber was dealt with by Lam Seng Traders - a family company whose directors are the same 2nd and 3rd defendants in CS 1098/87. The Court was referred to encl. 29, Exhibits 5A to 5N where some RM700,000 worth of cheques were transferred from Sindoma account in OCBC to the account of Lam Seng Traders. The Court was also referred to p. 17 of encl. 29 where some RM592,000 was on different dates transferred from Sindoma account in OCBC to Lam Seng Traders even before the charges were registered on 2 May 1984 to secure repayments of these amounts. The loans though raised for Sindoma were instead channelled for the family company to enable Lam Seng to deal in rubber since Sindoma had no licence to deal in rubber. Applicant as authority cited *Lai Soon Cheong v. Kien Loong Housing Development Sdn. Bhd. & Anor*. [1986] 2 MLJ 369, where the Supreme Court found for the purchaser of the lot who had paid substantially the purchase price and who alleged fraud having been perpetrated against him by the first and second respondents and he therefore sought to defeat the indefeasible title of the second respondent on that grounds. Counsel submitted a stay should also be given to applicant as there are weighty evidence to be gone through.

On his prayer for an injunction, the applicant's Counsel urged the Court to consider *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 where it was held that there is no bar to his being granted an order for a temporary injunction.

For the respondent chargees in his reply Counsel said that the case of *United Malayan Banking Corpn. Bhd. v. Syarikat Perumahan Luas Sdn. Bhd.* [1988] 2 CLJ (Rep) 522 was of no application since it clearly referred to an *ex parte* order and he contended that the present order dated 2 September 1987 encl. (34) was not such an order. He was of the view the case of *Hock Hua Bank Bhd. v. Sahari bin Murid* [1981] 1 MLJ 143 could be relevant as it was a case where it was decided after hearing all parties and similar to the present matter there was no appeal. Following *Hock Hua Bank's* case Counsel contended that the Court was *functus officio* with no more powers to vary the earlier order. Counsel urged that the OS 1158 - 1160 therefore had fatal flaw and had to be dismissed. In the matter of the *Hock Hua Bank's* case, Counsel for the chargor was described by the Federal Court as fortunate that the Counsel for the bank chargee had agreed to the stay whereas in the present case Counsel for the chargee had strict instruction not to concede to stay. Counsel also sought to distinguish *Lai Soon Cheong v. Kien Loong Housing Development Sdn. Bhd. & Anor*. [1986] 2 MLJ 369 (*supra*) where the order for stay granted was not to the sale of the whole land but the injunction granted was to a purchaser of one of the lots.

Counsel also referred to the jurisdiction of the Court in granting stay. He submitted that the Supreme Court decision is clear. He referred the Court to the *White Book* [1982] p. 3345 para. 3346 and drew the Court's attention to the case of *Lawrance v. Lord Norreys* which stated that the powers should be exercised sparingly. In the present case the order for sale is already granted. Applicant wants a stay of the order on 2 September 1987. He submitted no stay can be had in 1158 - 1160 as everything has come to an end by the order.

As regards the application for injunction in CS 1098/87 against the chargees where the order for sale had been granted, Counsel urged the Court to ask itself the question if the applicant could have raised all the allegations they are now raising in CS 1098/87 in the foreclosure proceedings leading to the order dated 2 September 1987, then raising them in the present application for an injunction is an abuse of the process. He cited *Lim Saw Bee v. Development and Commercial Bank Bhd.* (unreported) where a subsequent action to have order of sale set aside was struck out as the matters in the subsequent action should and could have been raised in the foreclosure proceeding. Since the matters were not so raised the matter was *res judicata*. Counsel cited *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor*. [1975] AC 581. Counsel also raised the question of the jurisdiction of the Court in granting the injunction sought in CS 1098/87 by reason of s. 54 of the Specific Relief Act 1950 where an injunction can only be granted to prevent multiplicity of suits which was not the case in the present matter before us. Secondly, the injunction is an order sought to be directed against the order of a High Court and not an order of a Subordinate Court. Counsel submitted that the injunction sought ought not to be granted. Counsel also urged on the Court to distinguish the case of *Tan Suan Choo v. Majlis Perbandaran Pulau Pinang* [1983] 1 MLJ 323 (*supra*) where the order sought was to restrain the Majlis Perbandaran but not the restraining of a Court order.

In this regard Counsel submitted that there is no provision in the High Court rules allowing a restrain of a Court order unlike the Indian provision which has such a procedure. He cited *Code of Civil Procedure* - Sarkar 8th Edn. where the practice is available in India not in our procedure. Counsel cited *Ram Sadhan Biswas v. Mathura Mohan Hazra* [1924] Indian cases Vol. 81, p. 3 at 6. As for the case *Bina Satu Sdn. Bhd. v. Tan Construction* [1988] 1 CLJ (Rep) 384 Counsel sought to distinguish it with the present application in that in *Bina Satu* the injunction sought was not to restrain a Court but the litigant, Tan Construction.

Counsel also urged the Court to consider the facts known to the chargee are set out in the affidavit of Chow Kwai Hin affirmed on 2 February 1988 encl. (21) in CS 1098/87. Counsel submitted that it cannot be the function and the burden of the chargee to be an investigative agent to ascertain the business of the customer especially when the objects of customer like the chargor is so wide as to be able to conduct all businesses. The chargee can only act according to the instructions of client especially if such is signed by known signatories else the chargees would be in breach of contract. In this instant, the applicant chargor is not alleging that the charges were signed by unauthorised persons.

Counsel for the chargor also submitted that the injunction if it is to be had must be given on established principle in *American Cyanamid Co.* principle. Even assuming that applicant chargor proceeds against the chargee the chargee (OCBC) is an established bank. The balance of convenience lies in favour of chargee proceeding with the sale and any damage suffered by the chargor can be ascertained and calculated in money and made good by the chargee.

There is also the fact that, Counsel submitted, the charges created are indefeasible under s. 340 National Land Code. The allegation that the charge was void because money was used wrongfully could not result in the charges becoming defeasible. The creation of the charge was authorised by the Board of the chargor. No allegation that the registration was a forgery. Counsel submitted the chargor may have a claim against the directors but on the facts, he submitted, there is no case against the chargee to have the charge declared a nullity.

The clear and distinct issues that fall for Court's decision, after listening to arguments, is, are there present circumstances on which the Court may exercise its discretion to set aside the order for sale? If this answer is in the negative, are there circumstances that exist that Court may give an injunction to restrain the order of sale?

On the application to have the order for sale set aside, the only reason given is the solicitors acting for the respondent chargor was not authorised to act. Other than that it is not suggested that the judgment was other than a regular judgment. I agree with the chargee's Counsel's submission that for the Court to set aside that judgment for that reason is to open the floodgate. That being the case, the Court cannot find any good reason why it should set aside the order for sale of 2 September 1987. I therefore dismiss that application to have the order of 2 September 1987 set aside or stayed with cost to the chargees to be taxed.

As regards the application for an injunction in CS 1098/87 the matter had to be separately considered. Quite rightly as submitted by the chargee's Counsel the matter is governed by different principles as stated in the case *American Cyanamid Co. v. Ethicon Ltd*. The injunction is an exercise of a discretion based on judicial principles. Where does the balance of convenience lie? Is it in granting or refusing it? If damages can be ascertained then injunction should be refused. Would damages of the applicant be adequate if the injunction is refused? The value of the lands charged which had been foreclosed can easily be ascertained at any given time and if the plaintiff wins in CS 1098/87 and the lands charged should not have been foreclosed, what has to be paid by the chargee in damages can be easily ascertained.

The injunction to my mind cannot also be granted for another very good reason. I agree with the submission of the Counsel for the chargee that there is no jurisdiction of this Court to restrain the order of another High Court of co-ordinate jurisdiction (see *Bina Satu Sdn. Bhd. v. Tan Construction* [1988] 1 MLJ 533).

Even if the Court could give the order to restrain, the Court concludes that this matter is *res judicata* in the broad sense as the matters raised could have been raised in the foreclosure proceedings. I find the authority in *Yat Tung Investment Co. Ltd. v. Dao Heng Bank Ltd. & Anor*. [1975] AC 581 binding on this Court where it was held that matters which could have been raised earlier should have been raised in the earlier proceeding and to raise again here is an abuse of the process of the Court.

Taking the application for injunction as a whole, the balance of convenience lies in refusing this application for injunction. For reason given I therefore refuse it. Application for injunction is also dismissed with cost to be taxed.

Also found at [1989] 1 CLJ 246